

REMARKS/ARGUMENTS

This is a Response to the Office Action mailed November 14, 2006, in which a three (3) month Shortened Statutory Period for Response has been set, due to expire February 14, 2007. Twenty (20) claims, including two (2) independent claims, were paid for in the application. Claims 1-4 and 9-12 were canceled by the Applicants in their August 15, 2006, response to the Office Action of May 15, 2006. Claim 5 is currently amended and claims 8 and 14-16 are canceled. No new matter has been added to the application. No fee for additional claims is due by way of this Amendment. The Director is authorized to charge any additional fees due by way of this Amendment, or credit any overpayment, to our Deposit Account No. 19-1090. Upon entry of the amendments herewith, claims 5-7, 13, and 17-21 remain pending.

1. Priority Date

In the Office Action at paragraph 1, the Examiner has indicated that "there is no certified translation of the priority document with the appropriate statements from the translator." Apparently, the English-language translation of the priority Japanese Patent Application No. 2002-234281 is not of record and, accordingly, the Examiner has not accorded the properly claimed date of priority of August 12, 2002.

The Applicants' Japanese attorney provided to us on July 31, 2003, a translation of the Japanese Patent Application No. 2002-234281, and further indicated in his certification (dated August 15, 2006) that the provided translation is true and accurate. Accordingly, the English-language translation of the priority Japanese Patent Application No. 2002-234281 specification (without claims) and the requisite signed statement by a translator conversant in the English and Japanese languages are being filed along with this Amendment. We will confirm that the certified translation is true and accurate, and if we are mistaken about the information that the Applicants' Japanese attorney has provided to us, we will provide a corrected and re-certified translation.

With the filing of these documents, it is kindly requested that the grounds for rejecting the claims on the basis of *Inoue '825* and *Inoue '080* be withdrawn.

2. Information Disclosure Statement

In the Office Action at paragraph 1, the Examiner refers to the “approximately 100 references” on the Information Disclosure Statements filed by the Applicant on June 5, 2006, and August 15, 2006, and has requested that the Applicants specify why the above referred to references were cited.

The Information Disclosure Statements were, in part, provided because of the Examiner’s three-way double patenting rejections, with which Applicants do not agree with and believe are improper. However, if the Examiner believes that the claims of the related cases are sufficiently similar to warrant a double patenting rejection, the art from the related co-pending applications might be considered relevant by the Examiner of the present application. Accordingly, the art of record in the above-identified co-pending applications, if not already disclosed, is disclosed out of an abundance of caution. This is the reason for the submission and the basis of relevance provided by Applicants’ attorney.

3. Rejections Under 35 U.S.C. § 112, Second Paragraph

In the Office Action at paragraph 3, claims 5-8 and 13-21 were rejected under 35 U.S.C. § 112, second paragraph, as allegedly being indefinite for failing to point out and distinctly claim the subject matter which the Applicants regard as their invention. Claim 5 is amended, as suggested by the Examiner. Accordingly Applicants respectfully request withdrawal of the rejection.

4. Rejections Under 35 U.S.C. § 103(a)

In the Office Action, at paragraph 6, claims 5-8 and 13-21 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over *Inuoe et al.* (U.S. Patent Publication No. 2004/0038080), hereinafter *Inuoe '080*, in view of *Inuoe et al.* (U.S. Patent Publication No. 2006/0078825), hereinafter *Inuoe '825*. In view of the submission of the English-language translation of the priority Japanese Patent Application No. 2002-234281, filed on August 12, 2002, and the requisite signed statement by a translator conversant in the English and Japanese

languages, it is kindly requested that the grounds for rejecting the claims on the basis of *Inoue '080* and *Inoue '825* be withdrawn.

5. Rejections Under 35 U.S.C. § 103(a)

In the Office Action, at paragraph 7, claims 5-6, 13-14, and 21 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over *Kobayashi et al.* (JP 62-204442), hereinafter *Kobayashi*. It is well-established at law that, for a proper rejection of a claim under 35 U.S.C. § 103 as being obvious based upon a combination of references, the cited combination of references must disclose, teach, or suggest, either implicitly or explicitly, all elements and/or features of the claim at issue. See, e.g., *In Re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988), and *In re Keller*, 208 U.S.P.Q. 871, 881 (C.C.P.A. 1981).

a. Independent Claim 5

Independent claim 5 is allowable for at least the reason that *Kobayashi* does not teach, suggest or render obvious at least the feature of “a first recording layer formed on the substrate and containing an element selected from a group consisting of C, Si, Ge and Sn as a primary component” and “a second recording layer located in a vicinity of the first recording layer and containing an element selected from the group consisting of C, Si, Ge and Sn and different from the element contained as the primary component in the first recording layer,” as recited in claim 5.

Kobayashi does not teach, suggest or render obvious using at least the above-recited elements in the first and second recording layers, as follows:

Kobayashi discloses a first embodiment where the first and second recording layers are Si and Au, which is not recited in claim 5.

Kobayashi discloses a second embodiment where the first and second recording layers are Si and Ag, which is not recited in claim 5.

Kobayashi discloses a third embodiment where the first and second recording layers are Te and Ge, which is not recited in claim 5.

In contrast, the first recording layer of claim 5 is an element selected from a group consisting of C, Si, Ge, and Sn as a primary component, and the second recording layer of claim

5 is an element selected from a group consisting of C, Si, Ge, and Sn and different from the element contained as the primary component in the first recording layer. None of the proposed combination of recording layer elements of *Kobayashi* are disclosed as the elements used in the first and second recording layers of claim 5. Accordingly, *Kobayashi* alone fails to establish a *prima facie* case of an obviousness rejection and the rejection to claim 5 should be withdrawn for at least this reason alone.

Furthermore, claim 5 recites the feature of a “light transmission layer provided on a side opposite to the substrate with respect to the first recording layer and the second recording layer.” The Applicants’ attorney in Japan has indicated that the layer identified by reference numeral 2 in the *Kobayashi* Figures is the substrate. The upper figure of *Kobayashi* appears to illustrate that the substrate 2 is receiving light L. Accordingly, *Kobayashi* fails to disclose the *light transmission layer provided on a side opposite to the substrate* with respect to the first recording layer and the second recording layer. Accordingly, *Kobayashi* alone fails to establish a *prima facie* case of an obviousness rejection and the rejection should be withdrawn.

Additionally, claim 5 recites the features of “a first dielectric layer provided between the light transmission layer and both the first recording layer and the second recording layer; and a second dielectric layer provided between the substrate and both the first recording layer and the second recording layer.” No type of dielectric layer is disclosed in the *Kobayashi* Abstract or Figures. Accordingly, *Kobayashi* alone fails to establish a *prima facie* case of an obviousness rejection. Therefore, the rejection to claim 5 should be withdrawn for at least this reason alone.

Finally, the Applicants’ Japanese attorney has indicated that *Kobayashi* discloses an optical recording disc 1 including a substrate 2 and a protective film 3, a recording layer 4, a protective film 5 and a protective film 6 laminated on the substrate 2 in this order (see *Kobayashi* page 2, lower right column and Figure 2).

However, *Kobayashi* discloses only a recording layer 4 constituted by the thin film 4₁ formed of Si and the thin film 4₂ formed of Au (page 3, upper and left column to lower and left column), a recording layer 4 constituted by the thin film 4₁ formed of Si and the thin film 4₂ formed of Ag (page 3, lower and left column to lower and right column) and a recording layer

4 constituted by the thin film 4₁ formed of Te and the thin film 4₂ formed of Ge (page 3, lower and right column to page 4, upper and left column). *Kobayashi* does not disclose or suggest that the recording layer 4 is constituted by the thin film 4₁ formed of Si, Te or the like and that the thin film 4₂ formed of Au, Ag, Ge or the like.

Further, the Applicants' Japanese attorney has indicated that *Kobayashi* states that the recording layer 4 can function as a phase change recording layer only when the thin film 4₁ is formed of Si and the thin film 4₂ is formed of Au, the thin film 4₁ is formed of Si and the thin film 4₂ is formed of Ag or the thin film 4₁ is formed of Te and the thin film 4₂ is formed of Ge and a ratio of the elements contained in the alloy falls within a specified range. Thus, it is not technically correct to conclude that *Kobayashi* teaches that the recording layer 4 is constituted by the thin film 4₁ formed of Si, Te or the like and the thin film 4₂ formed of Au, Ag, Ge or the like.

Therefore, since in *Kobayashi* the thin film 4₂ has to be formed of Au or Ag in the case where the thin film 4₁ is formed of Si and the thin film 4₂ has to be formed of Te in the case where the thin film 4₁ is formed of Ge, the compositions of the thin film 4₁ and the thin film 4₂ are apparently different from those of the first recording layer and the second recording layer defined in the present claim 5. That is, the same phenomena cannot occur between the claimed optical recording medium and the optical recording disc 1 of *Kobayashi* when the laser beam is projected thereonto. In view of the above remarks provided by the Applicants' Japanese attorney, claim 5 is unobvious over *Kobayashi*.

b. Dependent Claims 6, 13-14, and 21

Because independent claim 5 is allowable over the cited art of record, dependent claims 6, 13, and 21 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that the dependent claims 6, 13, and 21 contain all features/elements of independent claim 1. See, e.g., *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

Claim 14 is canceled without prejudice, waiver, or disclaimer.

The *Kobayashi* abstract and figures simply do not teach, suggest or render obvious a reflective layer provided between the substrate and the second dielectric layer, as recited in claim 6. The *Kobayashi* abstract and figures simply do not teach, suggest or render

obvious that the recording media is a write-one type media, as recited in claim 13. To infer such a teaching, the Office Action must improperly assume or infer other facts not actually disclosed in *Kobayashi*. Accordingly, *Kobayashi* fails to establish a *prima facie* case of an obviousness rejection and the rejection to claims 6 and 13 should be withdrawn for at least this reason alone.

Claim 21 is allowable for at least the reason that the proposed combination of *Kobayashi* does not teach, suggest or render obvious at least the feature “wherein the element contained in the first recording layer as a primary component and the element contained in the second recording layer as a primary component are mixed using a laser beam to form a record mark,” as recited in claim 21 (emphasis added). *Kobayashi* is a phase change type recording medium in that “the alloyed AuSi alloy, namely the recording layer 4, can be *changed* from the crystallized state to the amorphous state by the difference in energy quantity between the irradiated laser beams L” (Abstract, emphasis added). This phase change type recording medium is disclosed as Si and Au, Si and Ag, or Te and Ge. That is, there is no mixing of the *Kobayashi* recording layer material when changed from the crystallized state to the amorphous state. Accordingly, *Kobayashi* fails to establish a *prima facie* case of an obviousness rejection and the rejection to claim 21 should be withdrawn for at least this reason alone.

6. Rejections Under 35 U.S.C. § 103(a)

In the Office Action, at paragraph 8, claims 5-8, 13-16, and 21 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over *Kobayashi* in view of *Kinoshita et al.* (JP 2000-285509), hereinafter *Kinoshita*, and *Morimoto* (U.S. Patent 4,670,345), hereinafter *Morimoto*. It is well-established at law that, for a proper rejection of a claim under 35 U.S.C. § 103 as being obvious based upon a combination of references, the cited combination of references must disclose, teach, or suggest, either implicitly or explicitly, all elements and/or features of the claim at issue. See, e.g., *In Re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988), and *In re Keller*, 208 U.S.P.Q. 871, 881 (C.C.P.A. 1981).

a. References Not Properly Combinable

Kobayashi is used as a primary reference, which is modified by *Kinoshita* and *Morimoto*. *Kobayashi* is a phase change type recording medium in that “the alloyed AuSi alloy, namely the recording layer 4, can be changed from the crystallized state to the amorphous state by the difference in energy quantity between the irradiated laser beams L” (Abstract). This phase change type recording medium is disclosed as Si and Au, Si and Ag, or Te and Ge. That is, there is no mixing of the *Kobayashi* recording layer material when changed from the crystallized state to the amorphous state.

In contrast, *Kinoshita* is a fundamentally different type recording medium wherein the first and second recording layers are alloyed (paragraph 0004) and, thus, is a mixing type recording media. If *Kobayashi* is modified by the *Kinoshita* recording layer, the *Kobayashi* recording layer would become so fundamentally altered that its principle of operation would be changed. For example, if the *Kobayashi* phase change recording media is replaced by the two layers of the *Kinoshita*, which alloy (mix) upon irradiation, the modified recording medium would become a mixing type medium, thereby changing the principle of operation.

Applicants respectfully refer the Examiner to MPEP § 2143.02, entitled “THE PROPOSED MODIFICATIONS CANNOT CHANGE THE PRINCIPLE OF OPERATION OF A REFERENCE.” The MPEP states that “if the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims *prima facie* obvious.”

Because the principle of operation of *Kobayashi* after modification by *Kinoshita* would be changed, and since the rejection of the claims relies on a proposed combination of *Kobayashi* in view of *Kinoshita* and *Morimoto*, a *prima facie* of obviousness cannot be established under the above-described scenario wherein *Kobayashi* is modified by *Kinoshita*. Accordingly, the rejection under 35 U.S.C. § 103(a) should be withdrawn.

b. Independent Claim 5

Claim 5 is allowable for at least the reason that the proposed combination of *Kobayashi* in view of *Kinoshita* and *Morimoto* does not disclose, teach, or suggest at least the

feature of “a first dielectric layer provided between the light transmission layer and both the first recording layer and the second recording layer; and a second dielectric layer provided between the substrate and both the first recording layer and the second recording layer,” as recited in claim 5.

Kobayashi does not disclose, teach, or suggest two dielectric layers.

Kinoshita also fails to disclose, teach, or suggest two dielectric layers. *Kinoshita* discloses at most that “the sequential deposition of the recording layer 4 which consists of the light absorption layer 2, the optical interference layer 3, the 1st recording layer 104, and the 2nd recording layer 105 on the polycarbonate substrate 1, and the environmental protection layer 5 which consists of resin is carried out. The light absorption layer 2 consists of Au or aluminum. The optical interference layer 3 is ZnS-SiO₂ or SiO₂” (paragraph 15). “Optical interference layers are well-known dielectrics” (paragraph 5). The Office Action incorrectly alleges that the *Kinoshita* environmental protection layer 5 is a “dielectric layer (5).” Nowhere is the *Kinoshita* environmental protection layer 5 disclosed as being a dielectric layer. Since only one dielectric layer is disclosed, *Kinoshita* fails to disclose, teach, or suggest every element of the Applicants’ claimed invention.

Morimoto also fails to disclose, teach, or suggest at least two dielectric layers. The *Morimoto* Figures illustrate, at most, a layer 3 and a layer 5, but these layers are not disclosed as dielectric layers in the *Morimoto* Abstract. Thus, *Morimoto* fails to disclose, teach, or suggest every element of the Applicants’ claimed invention.

Accordingly, the proposed combination of *Kobayashi* in view of *Kinoshita* and *Morimoto* does not disclose at least the claimed limitations of “a first dielectric layer provided between the light transmission layer and both the first recording layer and the second recording layer; and a second dielectric layer provided between the first recording layer and both the second recording layer and the substrate,” as recited in claim 5. Therefore, a *prima facie* case establishing an obviousness rejection by *Kobayashi* in view of *Kinoshita* and *Morimoto* has not been made. Thus, claim 5 is not obvious under the proposed combination and the rejection should be withdrawn.

c. Claims 6-8, 13-16, and 21

Because independent claim 5 is allowable over the cited art of record, dependent claims 6, 7, 13, and 21 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that the dependent claims 6, 7, 13, and 21 contain all features/elements of independent claim 1. See, e.g., *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

Claims 8 and 14-16 are canceled without prejudice, waiver, or disclaimer.

7. Rejections Under 35 U.S.C. § 103(a)

In the Office Action, at paragraph 9, claims 5-8, 13-16, and 21 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over *Kobayashi* in view of *Kinoshita* and *Morimoto* and further in view of *Okawa et al.* (JP 62-028941), hereinafter *Okawa*, or *Fukano et al.* (U.S. Patent Publication No. 2001/0044073), hereinafter *Fukano '073*. It is well-established at law that, for a proper rejection of a claim under 35 U.S.C. § 103 as being obvious based upon a combination of references, the cited combination of references must disclose, teach, or suggest, either implicitly or explicitly, all elements and/or features of the claim at issue. See, e.g., *In Re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988), and *In re Keller*, 208 U.S.P.Q. 871, 881 (C.C.P.A. 1981).

a. Independent Claim 5

Claim 5 is allowable for at least the reason that the proposed combination of *Kobayashi* in view of *Kinoshita* and *Morimoto*, and further in view of *Okawa* or *Fukano '073*, does not disclose, teach, or suggest at least the feature of “a first dielectric layer provided between the light transmission layer and both the first recording layer and the second recording layer; and a second dielectric layer provided between the substrate and both the first recording layer and the second recording layer,” as recited in claim 5.

Kobayashi does not disclose, teach, or suggest two dielectric layers.

Kinoshita also fails to disclose, teach, or suggest two dielectric layers. *Kinoshita* discloses, at most, that “the sequential deposition of the recording layer 4 which consists of the light absorption layer 2, the optical interference layer 3, the 1st recording layer 104, and the 2nd

recording layer 105 on the polycarbonate substrate 1, and the environmental protection layer 5 which consists of resin is carried out. The light absorption layer 2 consists of Au or aluminum. The optical interference layer 3 is ZnS-SiO₂ or SiO₂" (paragraph 15). "Optical interference layers are well-known dielectrics" (paragraph 5). The Office Action incorrectly alleges that the *Kinoshita* environmental protection layer 5 is a "dielectric layer (5)" at page 5. Nowhere is the *Kinoshita* environmental protection layer 5 disclosed as being a dielectric layer. Since only one dielectric layer is disclosed, *Kinoshita* fails to disclose, teach, or suggest every element of the Applicants' claimed invention.

Morimoto fails to disclose, teach, or suggest at least two dielectric layers. The *Morimoto* Figures illustrate, at most, a layer 3 and a layer 5, but these layers are not disclosed as dielectric layers in the *Morimoto* Abstract. Thus, *Morimoto* fails to disclose, teach, or suggest every element of the Applicants' claimed invention.

Okawa does not disclose, teach, or suggest any dielectric layers.

Fukano '073 does not disclose, teach, or suggest any dielectric layers.

Accordingly, the proposed combination of *Kobayashi* in view of *Kinoshita* and *Morimoto*, and further in view of *Okawa* or *Fukano* '073, does not disclose at least the claimed limitations of "a first dielectric layer provided between the light transmission layer and both the first recording layer and the second recording layer; and a second dielectric layer provided between the first recording layer and both the second recording layer and the substrate," as recited in claim 5. Therefore, a *prima facie* case establishing an obviousness rejection by *Kobayashi* in view of *Kinoshita* and *Morimoto*, and further in view of *Okawa* or *Fukano* '073, has not been made. Thus, claim 5 is not obvious under the proposed combination and the rejection should be withdrawn.

Furthermore, Applicants respectfully traverse the holding "that Ge is a primary component in the first layer and C is a primary component in the second" layer of *Okawa* as alleged at page 6 of the Office Action. *Okawa* does not teach what is alleged. *Okawa* discloses in the Abstract that "when the files 12 and 13 are laminate, a plasma-polymerized material blocks the diffusion of Ge and Te fine particles at ordinary temp. When a laser beam is irradiated on such a recording medium from the substrate side 11, the films 12 and 13 are mixed,

a single layer 15 having different reflectivity is formed.” Nowhere is there any disclosure whatsoever that C is a primary component in the second layer, as alleged. Accordingly, claim 5 is not obvious under the proposed combination as alleged and the rejection should be withdrawn.

Also, the Office Action alleges that “Fukano et al. ‘860 teach[es] the use of carbon barrier layers between alloying/reaction recording bilayers (2/30-40, 3/5-20)” at page 6. Since *Fukano et al. ‘860* is not used as part of the stated basis for the rejection of claims 5-8, 13-16, and 21, Applicants are unable to respond since it is unclear how, or even if, *Fukano et al. ‘860* is being used by the Office Action. If a rejection is maintained under *Fukano et al. ‘860* in the next Office Action, Applicants respectfully request clarification.

b. Dependent Claims 6-8, 13-16, and 21

Because independent claim 5 is allowable over the cited art of record, dependent claims 6, 7, 13, and 21 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that the dependent claims 6, 7, 13, and 21 contain all features/elements of independent claim 1. See, e.g., *In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

Claims 8 and 14-16 are canceled without prejudice, waiver, or disclaimer.

8. Rejections Under 35 U.S.C. § 103(a)

In the Office Action, at paragraph 10, claims 5-8 and 13-21 stand rejected under 35 U.S.C. § 103(a) as allegedly unpatentable over *Kobayashi* in view of *Morimoto* and further in view of *Mizushima et al.* (WO 03/025924), hereinafter *Mizushima*.

The Applicants respectfully point out that *Mizushima* was originally filed in Japan in the Japanese language on September 9, 2001 (13.09.2001). *Mizushima*’s international filing on September 11, 2002 (11.09.2002), and publication on March 27, 2003 (27.03.2003), were in the Japanese language, according to the WIPO cover sheet for WO 03/025924 A1. The present application was filed in the U.S. on August 7, 2003, and properly claims priority to Japanese Patent Application No. 2002-234281, filed on August 12, 2002. The August 12, 2002, foreign priority date of the instant application precedes the March 27, 2003, WIPO publication date of *Mizushima*. Furthermore, the August 12, 2002, foreign priority date of the instant

application precedes the September 11, 2002, international filing date of *Mizushima*. To properly be used as a reference, *Mizushima* must have been filed in the English language (or an English translation provided). Therefore, *Mizushima* does not properly qualify as prior art.

Since *Mizushima* fails to qualify as prior art, the proposed combination of *Kobayashi* in view of *Morimoto* and further in view of *Mizushima* is not proper. Therefore, a *prima facie* case establishing an obviousness rejection by *Kobayashi* in view of *Morimoto* and further in view of *Mizushima* has not been made and the rejection should be withdrawn.

9. Obviousness-Type Double Patenting Rejections

In the Office Action at paragraph 12, claims 5-8 and 13-21 have been provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being obvious over U.S. Patent Application No. 11/268,109 filed by *Aoshima et al.*, as being obvious over U.S. Patent Application No. 10/818,324 filed by *Aoshima et al.*, and as being obvious over U.S. Patent Application No. 10/748,979 filed by *Arai et al.*.

As noted by the Examiner, a terminal disclaimer may be used to overcome a provisional rejection based on a non-statutory obviousness-type double patenting. The Applicant will consider filing a terminal disclaimer in the present application if one or both of these co-pending applications issue before the present application and if the present application is still pending at that point. Otherwise, it is respectfully submitted that since none of these other co-pending applications has yet issued, the present application can be passed into allowance and issued without the filing of a terminal disclaimer. A terminal disclaimer may then be filed, if appropriate, in one or more of these other co-pending applications, based on the issuance of the present application.

10. Conclusion

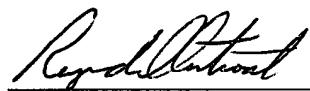
In light of the above amendments and remarks, Applicants respectfully submit that all objections and/or rejections have been traversed, rendered moot, and/or accommodated, and that all pending claims 5-7, 13, and 17-21 are allowable. Applicants, therefore, respectfully request that the Examiner reconsider this application and timely allow all pending claims. The

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Examiner is encouraged to contact Mr. Armentrout by telephone to discuss the above and any other distinctions between the claims and the applied references, if desired. If the Examiner notes any informalities in the claims, he is further encouraged to contact Mr. Armentrout by telephone to expediently correct such informalities.

Respectfully submitted,

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